JEFFREY M. HAHN (admitted pro hac vice)
hahn.jeffrey.m@dol.gov
DAVID M. ELLIS, DC SBN 976985 (pro hac vice application pending)
ellis.david.m@dol.gov
Office of the Solicitor
Plan Benefits Security Division
United States Department of Labor
P.O. Box 1914
Washington, DC 20013
Tel: (202) 693-5600; Fax: (202) 693-5610

Attorneys for Plaintiff SETH D. HARRIS
Acting Secretary of Labor, United States Department of Labor

UNITED STATES DISTRICT COURT FOR THE

CENTRAL DISTRICT OF CALIFORNIA

SETH D. HARRIS[1], Acting Secretary, United States Department of Labor, Plaintiff, v. **GREATBANC TRUST COMPANY,** et al., Defendants.	Case No. EDCV12-1648-R (DTBx) **SECRETARY'S REPLY TO DEFENDANT GREATBANC'S OPPOSITION TO MOTION TO STRIKE AFFIRMATIVE DEFENSES** Date: March 4, 2013 Time: 10:00 a.m. Hon. Manuel L. Real Courtroom 8

[1] This substitution is made pursuant to Fed. R. Civ. P. 25(d) following the resignation of Hilda L. Solis and the appointment of Seth D. Harris as the Acting Secretary of Labor.

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In reply to Defendant GreatBanc's Opposition to the Secretary's Motion to Strike Defendant GreatBanc's Affirmative Defenses (Dkt. 29) ("Opp."), Seth D. Harris, Acting Secretary of the United States Department of Labor ("Secretary"), respectfully makes the following points:

I. Twombly's and Iqbal's Heightened Pleading Standards Apply to Affirmative Defenses

The weight of the case law holds that the heightened pleading standards of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 1974 (2007), and Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949 (2009), apply to affirmative defenses. To be clear, there is not yet controlling authority on this issue; neither the Supreme Court nor the Ninth Circuit has decided this question, and neither Plaintiff nor Defendant has cited to a published Central District of California decision, although there are unpublished cases from this Court reaching opposing conclusions. Secretary's Memorandum in Support of Motion to Strike Defendant GreatBanc's Affirmative Defenses (Dkt 24-1) ("Sec. Mem") at 5; Opp at 4. Nonetheless, the weight of authority in the district courts holds that the heightened pleading requirements of Iqbal/Twombly apply to affirmative defenses. Gonzalez v. Heritage Pac. Fin., LLC, 2:12-CV-01816-ODW, 2012 WL 3263749, at *1 (C.D. Cal. Aug. 8, 2012) ("The majority of district courts have held that the Twombly/Iqbal pleading standard applies equally to the pleading of affirmative defenses as it does to the pleading of claims for relief in a complaint."); Dion v. Fulton Friedman & Gullace LLP, 11-2727 SC, 2012 WL 160221, at *2 (N.D. Cal. Jan. 17, 2012) ("A majority of district courts have held" that heightened pleading standards apply for affirmative defenses); Barnes v. AT & T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1171-1172 (N.D. Cal. 2010) ("the vast majority of courts presented with the issue have extended Twombly's heightened pleading standard to affirmative defenses"); Hayne v. Green Ford Sales, Inc., 263 F.R.D. 647, 649-50 (D. Kan. 2009) ("The majority of courts addressing the issue, however, have applied the heightened pleading standard announced in Twombly, and further clarified in Iqbal, to affirmative defenses).

In arguing that heightened pleading standards apply to only certain portions of Rule 8, GreatBanc focuses on the language of Rule 8(c) rather than Rule 8(b)(1)(A). But Rule 8(c) simply offers a "helpful laundry list of commonly asserted affirmative defenses to emphasize that avoidances and affirmative defenses must indeed be pled to be preserved," while Rule 8(b)(1)(A) provides the baseline requirements for pleading defenses. Hayne, 263 F.R.D. at 650. And while GreatBanc relies heavily on the fair notice pleading standard of Wyshak v. City Nat'l Bank, 607 F.2d 824, 827 (9th Cir.

1979), Wyshack itself relied on the parallelism between pleading complaints and affirmative defenses when it applied the pre-Twombly/Iqbal pleading requirements to affirmative defenses. Perez v. Gordon & Wong Law Group, P.C., 11-CV-03323-LHK, 2012 WL 1029425, at *7 (N.D. Cal. Mar. 26, 2012) (citing Wyshack, 607 F.2d at 827). Thus, Twombly/Iqbal's interpretation of the pleading requirements for a complaint applies equally to the pleading requirements for an affirmative defense.

Further, the pleading requirements in the Federal Rules for claims and affirmative defenses mirror each other. Woodfield v. Bowman, 193 F.3d 354, 362 (5th Cir. 1999) ("An affirmative defense is subject to the same pleading requirements as is the complaint"). Rule 8(a)(2) requires a pleading that states a claim for relief to be a "short and plain statement of the claim"; Rule 8(b)(1)(A) requires that a party responding to a pleading “state in short and plain terms its defenses to each claim.” See Barnes v. AT & T Pension Ben. Plan-Nonbargained Program, 718 F. Supp. 2d 1167, 1172 (N.D. Cal. 2010) ("Rule 8's requirements with respect to pleading defenses in an answer parallels the Rule's requirements for pleading claims in a complaint.").

Iqbal/Twombly pronounced higher pleading standards in order to effectuate "the purpose of Rule 8," which is "to give the opposing party notice of the basis for the claim sought." Id. The purpose of minimum pleading standards is identical for claims and defenses: "to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case." Hayne, 263 F.R.D. at 650. Indeed, it "makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses," id., as the "defendant bears the burden of proof on an affirmative defense, in the same way that the plaintiff bears the burden of proof on a claim for relief." Perez, 2012 WL 1029425, at *7

The broader interest of avoiding needless discovery applies to discovery that results from both claims and defenses. See Shinew v. Wszola, CIV.A. 08-14256, 2009 WL 1076279, at *4 (E.D. Mich. 2009) ("The Twombly decision also observed that discovery costs required to explore the factual basis for a pled claim or defense are a problem."). Unnecessary discovery resulting from spurious affirmative defenses is just as wasteful as discovery resulting from improperly pled claims. See Barnes, 718 F. Supp. 2d at 1173 ("If the court were to permit legally unsustainable affirmative defenses to survive, Barnes would be required to conduct expensive and potentially unnecessary and irrelevant discovery."); see also Fantasy, Inc. v. Fogerty, 984 F.2d 1524, 1527 (9th Cir. 1993), rev'd on other grounds, 510 U.S. 517 (1994) ("[T]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial . . . ."). As such, the pleading standard for claims, which "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claims, Twombly, 550 U.S. at 556, applies equally to defenses.

II. GreatBanc's Implausible Statute of Limitations Affirmative Defense Should Be Stricken

Defendant does not plead enough facts to raise a reasonable expectation that discovery will reveal evidence supporting its statute of limitations defense. By GreatBanc's logic, simply asserting that a statute of limitations exists is sufficient to meet pleading standards. Opp at 8-9. But the empty citation to a statute vitiates the requirements that parties receive fair notice of the claims or defenses at issue in litigation, and that the claim or defense raise a reasonable expectation that discovery will result in further evidence supporting its assertion. See Ear v. Empire Collection Authorities, Inc., 2012 WL 3249514, at *1 (N.D. Cal. Aug. 7, 2012) (striking statute of limitations affirmative defense where suit was filed within limitations period).

In this case in particular, GreatBanc is a signatory to an agreement tolling the statute of limitations until a date after the Complaint was filed.

Sec. Mem. at 8-9; GreatBanc's Answer at 36-37, First Affirmative Defense at ¶ 3 (Dkt. No. 21). The undisputed existence of this tolling agreement between the parties renders GreatBanc's statute of limitations affirmative defense spurious and implausible. Discovery that will necessarily result from this implausible affirmative defense will be a waste of time and resources for both parties. As such, this Court should strike this improper affirmative defense "to avoid the expenditure of time and money" associated with litigating "spurious issues." Sidney–Vinstein v. A.H. Robins Co., 697 F.2d 880, 885 (9th Cir. 1983).

III. GreatBanc's Failure to State a Claim Affirmative Defense is Not Properly Pled

Regardless of whether Iqbal/Twombly's heightened pleading standards apply to affirmative defenses, Defendant's Second Affirmative Defense of failure to state a claim is not a proper affirmative defense. An affirmative defense will "defeat the plaintiff's claim even where the plaintiff has stated a prima facie case for recovery under the applicable law." Quintana v. Baca, 233 F.R.D. 562, 564 (C.D. Cal. 2005); accord Gessele v. Jack in the Box, Inc., 3:10–cv–960–ST, 2011 WL 3881039, at *2 (D. Or. Sept. 2, 2011) ("[A]n affirmative defense admits the allegations in the complaint, but avoids liability with new allegations of excuse, justification, or other negating matters ..."); People v. Classic Woodworking LLC, C-04-3133 MMC, 2005 WL 645592, at *5 (N.D. Cal. Mar. 4, 2005) (citing Black's Law Dictionary 451 (8th ed. 2004) for the proposition that "an 'affirmative defense' assumes the truth of the opposing parties' allegations"). By contrast, "[a] defense which demonstrates that plaintiff has not met its burden of proof is not an affirmative defense." Zivkovic v. S. California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002).

Courts "should strike affirmative defenses that are clearly mistitled or redundant, for example if they raise matters already raised in the defendant's denial." Renalds v. S.R.G. Rest. Group, 119 F.Supp.2d 800, 802 (N.D. Ill. 2000); see also Figueroa v. Marshalls of CA, LLC, CV11-06813-RGK SPX, 2012 WL 1424400, at *3 (C.D. Cal. Apr. 23, 2012) (striking affirmative defense that "is merely a denial of Plaintiff's prima facie case, and as such is improperly raised as an affirmative defense"); Solis v. Couturier, 208CV02732RRBGGH, 2009 WL 2022343, at *3 (E.D. Cal. July 8, 2009) (striking affirmative defense that was "merely a restatement of Couturier's denial of liability, or an assertion that the Secretary cannot prove the elements of her claim."). As GreatBanc's Second Affirmative Defense necessarily denies the truth of the allegations in the complaint — which specifically assert two claims of relief, Complaint ¶¶ 65-76 — Defendant's

Second Affirmative Defense is not properly pled under any applicable standard. Quintana, 233 F.R.D. at 264.

GreatBanc justifies this improper defense by citing a case from the District Court of Oregon for the proposition that failure to state a claim may be raised in a responsive pleading under Rule 7(a). Opp at 8. But GreatBanc's Second Affirmative Defense is redundant, given that GreatBanc has already asserted this point through its denials of the claims in the Complaint, GreatBanc Answer (Dkt. 21) at ¶¶ 67-76, and its Rule 12(b)(6) motion to dismiss Count II of the Complaint (Dkt. 22). This redundancy will create "delay, and confusion of the issues." Fantasy, Inc. 984 F.2d at 1528.

Further, GreatBanc's argument fails to address the overwhelming case law from this Court and other Ninth Circuit district courts that have found that failure to state a claim is not a proper affirmative defense. See, e.g., Figueroa, 2012 WL 1424400, at *3 ("Defendant's First Defense for failure to state a claim is appropriately brought as a motion to dismiss under Rule 12(b)(6) and is not an appropriate affirmative defense."); J & J Sports Productions, Inc. v. Delgado, CIV. 2:10-2517 WBS, 2011 WL 219594, at *2 (E.D. Cal. Jan. 19, 2011) ("Failure to state a claim is not an affirmative defense."); J & J Sports Productions, Inc. v. Montanez, 1:10-CV-01693-AWI, 2010 WL 5279907, at *2 (E.D. Cal. Dec. 13, 2010) ("Failure to state a claim is an assertion of a defect in Plaintiff's prima facie case, not an affirmative defense."); Joe Hand Promotions, Inc. v. Alvarado, 1:10-CV-00907 LJO, 2010 WL 4746165, at *2 (E.D. Cal. Nov. 16, 2010), rev'd on other grounds, 2011 WL 201466 (E.D. Cal. Jan. 19, 2011) ("general denials of the allegations in the complaint or allegations that plaintiff cannot prove certain elements of his claim are not affirmative defenses.").

This litigation gains nothing but distraction and confusion if GreatBanc's redundant Second Affirmative Defense remains in the pleadings despite being a mere duplication of its denials. See Barnes, 718 F.Supp.2d at 1173. Thus, GreatBanc's Second Affirmative Defense must be struck as improperly pled.

IV. GreatBanc's Third Affirmative Defense Purporting to Reserve the Right to Add Additional Affirmative Defenses is Improperly Pled

As noted in the Secretary's opening brief, courts routinely strike affirmative defenses that purport to reserve the right to assert additional affirmative defenses. Sec. Mem. at 11-12 (citing seven cases that have stricken reservation-of-rights affirmative defenses).

In response to this overwhelming case precedent, GreatBanc cites one Northern District of California case that did not strike a reservation-of-rights defense because the plaintiff in that case had not demonstrated prejudice from its inclusion. Kabushiki Kaisha Stone Corp. v. Affliction, Inc., C 09-2742 RS, 2010 WL 890018, at *3 (N.D. Cal. Mar. 8, 2010). Unlike that one case, the Secretary has amply demonstrated prejudice. First, the insertion of an affirmative defense that is either duplicative or inconsistent with the Federal Rules will create "delay, and confusion of the issues." Fantasy, Inc. 984 F.2d at 1528. Further, the Secretary does not wish to suffer "the expenditure of time and money that must arise from litigating spurious issues . . . ." Sec. Mem. at 6 (citing Fantasy, Inc., 984 F.2d 1524 at 1527). Instead, the Secretary aims to "streamline the ultimate resolution of the action" and avoid the "needless expenditure of time and money." Griffin v. Gomez, C 98–21038 JW (NJV), 2010 WL 4704448, at *4 (N.D. Cal. Nov. 12, 2010). Further, if this Court finds that this defense is not redundant with the Federal Rules, then the Secretary will suffer prejudice if this defense does in fact operate to "preserve rights beyond those guaranteed in the Federal Rules." Sec. Mem. at 13.

GreatBanc has not asserted any purpose for this affirmative defense other than "highlight[ing] its intent to continue to review and analyze the underlying facts of this matter and raise additional affirmative defenses as appropriate." Opp. at 10. But any competent defendant does this in every case pursuant to Rule 15's limitations that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15. The fact that GreatBanc's defense attorneys wish to state that they are doing their job does not otherwise justify an otherwise improper affirmative defense.

V. CONCLUSION

For the reasons discussed above and to avoid the time and expense to the Secretary of conducting discovery and the unnecessary expenditure of legal and judicial resources, this Court should strike Defendant GreatBanc's Affirmative Defenses.

Respectfully submitted:

Dated: February 19, 2013

For the Secretary:

M. PATRICIA SMITH
Solicitor of Labor

TIMOTHY D. HAUSER
Associate Solicitor
Plan Benefits Security Division

RISA D. SANDLER
Counsel for Fiduciary Litigation

/s/______________________________
JEFFREY M. HAHN
Trial Attorney, DC SBN 975576
DAVID M. ELLIS,
Trial Attorney, DC SBN 976985
Office of the Solicitor
Plan Benefits Security Division
U.S. Department of Labor
P.O. Box 1914
Washington, DC 20013
Tel: (202) 693-5600
Fax: (202) 693-5610
hahn.jeffrey.m@dol.gov
ellis.david.m@dol.gov
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Secretary's Reply to Defendant GreatBanc's Opposition to Motion to Strike Affirmative Defenses in the above-captioned case was served on counsel of record via the court's ECF system.

/s/________________________
JEFFREY HAHN